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No. 89-1385

In The

Supreme Court of the United States

October Term, 1989

MARCIA JONES,

Petitioner,

v.

HARRY PSIMOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the mandatory and jurisdictional prerequisites for appellate jurisdiction have been met when petitioner failed to timely file a notice of appeal after the entry of the final appealable judgment.

2. Whether the petitioner timely filed with this Court corrected copies of the petition within 150 days after the entry of the order denying the petition for rehearing in the circuit court.

3. Whether the petitioner has cited to sufficient evidence in the record to set forth a *prima facie* case of legal malpractice at the appellate level under Indiana law.

4. Whether a substantial federal question has been raised.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Harry Psimos, respectfully prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

1. The order of the Indiana state court, Jasper Circuit Court, Rensselaer, Indiana, distributing the property in a dissolution of marriage case entered on January 25,

1984 is unreported. It is reprinted in petitioner's Appendix (App. 50-64).

2. The order of the United States District Court for the Northern District of Indiana granting summary judgment in favor of the respondent entered on August 18, 1988 is unreported. It is purportedly reprinted in petitioner's Appendix (App. 18-41). However, page five (5) of the district court's fourteen (14) page order is omitted from petitioner's Appendix. The order is therefore reproduced in its entirety in respondent's Appendix (App. 1-13).

3. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court's order granting summary judgment in favor of the respondent entered on August 21, 1989 as amended on August 28, 1989 is reported at 882 F.2d 1277 (7th Cir. 1989).

4. The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing entered on September 26, 1989 is unreported. It is reprinted in petitioner's Appendix (App. 65).

JURISDICTION

Jurisdiction in the district court is based on diversity of citizenship. 28 U.S.C. § 1332. The underlying events occurred in Indiana and parties have previously agreed that Indiana law applies to the substantive issues. On November 9, 1984, Marcia Jones filed a complaint in district court against her former attorney, Harry Psimos, for legal malpractice at the appellate level in failing to timely file certain documents with the Court of Appeals

of Indiana. Subsequently, Psimos, *pro se*, filed a counter-claim against Jones for unpaid attorney's fees, costs and expenses incurred for his services rendered in the underlying state court divorce proceeding.

On August 18, 1988, District Court Judge Michael M. Mihm of the Central District of Illinois, sitting by designation, entered an order granting Psimos' motion for summary judgment on the legal malpractice claim only. The counter-claim remained viable. Jones filed a notice of appeal on September 16, 1988. At the time, the August 18, 1988 order was not a final and appealable order or judgment due to the pending counter-claim. Furthermore, the district court had not certified the decision as a final appealable decision pursuant to Fed.R.Civ.P. 54(b). Thus, the filing of a notice of appeal on September 16, 1988 was clearly premature since the order appealed from was not yet a final appealable order or judgment. On October 4, 1988, the district court then entered an order making the appropriate findings and certifying its prior order as a final appealable decision pursuant to Fed.R.Civ.P. 54(b). Judgment in a Civil Case was entered by the Clerk for the Northern District of Indiana on October 6, 1988. No notice of appeal was ever filed by Jones from the district court's final decision entered on October 6, 1988. *Jones v. Psimos*, 822 F.2d 1277, 1280 (7th Cir. 1989).

Jurisdiction in the court of appeals is purportedly based upon 28 U.S.C. § 1291 which confers jurisdiction of appeals from all final decisions of the district court. Psimos filed a motion to dismiss the appeal with supporting memorandum which was denied by the court of appeals on January 30, 1989. This issue was again raised by Psimos in his brief before the court of appeals, but the

merits of the motion were not addressed in the opinion. *Jones*, 882 F.2d at 1280, n. 4.

The court of appeals affirmed the district court's order granting summary judgment in favor of the respondent on August 21, 1989 as amended on August 28, 1989. On September 5, 1989, the petitioner filed a petition for rehearing which was denied by the court of appeals on September 26, 1989.

A petition for writ of certiorari was filed on December 26, 1989 asserting jurisdiction under 28 U.S.C. § 2101(c). On January 11, 1990, the clerk returned the petition to the petitioner for failure to comply with several of the Court's rules of procedure. Corrected copies were to be returned promptly in order for the case to be docketed. Sup.Ct.R. 33.7. On March 1, 1990, petitioner filed a corrected petition for writ of certiorari. Respondent asserts that a corrected petition is untimely since it was filed more than one hundred fifty (150) days after entry of the order denying the petition for rehearing. 28 U.S.C. § 2101(c); Sup.Ct.R. 13.1, 13.2 and 13.3.

STATUTE INVOLVED

The applicable Indiana statute, Ind. Code § 31-1-11.5-11 is set forth in its entirety in respondent's Appendix (App. 14-17). The relevant portion of that statute on disposition of property in a dissolution proceeding is set forth as follows:

> (c) The court shall presume that an equal division of marital property between the parties is just and reasonable. However, this presumption

may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The ecomonic circumstances of each spouse at the time of the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of the property and final determination of the property rights of the parties.

Ind. Code § 31-1-11.5-11(c) (1988).

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER HAS FAILED TO COMPLY WITH THE MANDATORY AND JURISDICTIONAL PREREQUISITES FOR APPELLATE JURISDICTION BY FAILING TO TIMELY FILE A NOTICE OF APPEAL AFTER THE ENTRY OF THE FINAL APPEALABLE JUDGMENT OF OCTOBER 6, 1988.

This lawsuit arises out of an Indiana state court dissolution proceeding between Marcia and Edward Jones.

On February 9, 1982, Edward filed a Verified Petition for Dissolution of Marriage. Marcia Jones retained attorney Harry Psimos to defend her in the dissolution proceeding. On November 23, 1982, Jasper Circuit Court Judge Daugherty entered an order dissolving the marriage and, by agreement of the parties, retained the issue of property distribution for later determination.

During the summer of 1983, the trial judge heard four (4) days of testimony regarding the alleged assets and liabilities of Marcia and Edward. After taking the matter under advisement, the trial judge entered an order dated January 25, 1984 distributing the marital assets and liabilities. Marcia thereafter requested Psimos to appeal the trial judge's order. Unfortunately, Psimos failed to timely file required pre-appeal documents and the appeal was dismissed.

Marcia filed this action before the district court alleging legal malpractice at the appellate level against Psimos in the handling of the appeal. Psimos, *pro se*, filed a counter-claim for unpaid attorney's fees, costs and expenses. After the matter had been fully briefed, the district court judge, sitting by designation, entered an order on August 18, 1988 granting Psimos' motion for summary judgment on the legal malpractice claim.

The sequence of events during the next several weeks is significant and summarized as follows:

Date	District Court Activity
08/18/88	District court enters order granting Psimos' motion for summary judgment.

08/19/88 Judgment in a Civil Case entered by Clerk of the Central District of Illinois.

09/01/88 District court issues corrective order directing Clerk of the Northern District of Indiana to enter judgment.

09/09/88 Judgment entered of record by Clerk of the Northern District of Indiana.

09/16/88 Notice of appeal filed by Jones.

10/04/88 District court enters order directing judgment on legal malpractice claim pursuant to Fed.R.Civ.P. 54(b).

10/06/88 Judgment entered of record by Clerk of the Northern District of Indiana.

Generally, the timely filing of a notice of appeal of a final judgment divests the district court of jurisdiction over those aspects involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225, 227 (1982). The general rule does not operate when there is a purported appeal from a non-appealable order or a judgment. *Patzer v. Board of Regents of University of Wisconsin System*, 763 F.2d 851, 859 (7th Cir. 1985); *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091, 103 S.Ct. 790, 76 L.Ed.2d 358 (1983).

United States District Court Judge Mihm, a visiting judge from the Central District of Illinois, entered summary judgment on the legal malpractice claim on August 18, 1988. The counter-claim remained pending in district court. The Clerk of the Central District of Illinois entered Judgment in a Civil Case as directed by the district court.

On September 1, 1988, the district court entered a corrective order directing the Clerk of the Northern District of Indiana to enter judgment which was completed on September 9, 1988.

On September 16, 1988, Jones filed a notice of appeal even though there was no final appealable decision due to a pending counter-claim. The district court's order granting summary judgment was not certified as a final appealable order under Fed.R.Civ.P. 54(b). At the time of the filing of the notice of appeal on September 16, 1988, there clearly was no final appealable decision in order to invoke federal appellate jurisdiction pursuant to 28 U.S.C. § 1291.

On October 4, 1988, the district court conducted a hearing on the pending motion for summary judgment on the counter-claim. The district court also discussed whether it had jurisdiction over the original claim since a premature notice of appeal had been filed. At the hearing, the parties and the district court agreed that the decision previously rendered on August 18, 1988 was not appealable since the counter-claim was pending. Moreover, summary judgment on the original claim had not been properly certified as a final appealable order or judgment under Fed.R.Civ.P. 54(b). The district court then entered an order on October 4, 1988 making the necessary findings under Fed.R.Civ.P. 54(b). Judgment in a Civil Case was entered by the Clerk of the Northern District of Indiana on October 6, 1988. Significantly, no notice of appeal was filed by Jones from the only final judgment entered on October 6, 1988.

A. THE UNTIMELY FILING OF THE NOTICE OF APPEAL ON SEPTEMBER 16, 1988 IS INSUFFICIENT TO INVOKE APPELLATE JURISDICTION.

Fed.R.App.P. 3(a) provides, in part:

> An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

The specific time frame in which to file a notice of appeal is set forth in Fed.R.App.P. 4(a)(1) which provides, in part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Further support for dismissal of the appeal is found in the Notes of Advisory Committee on Appellate Rules, 1979 Amendment, Fed.R.App.P. 4(a)(1), which provides, in part:

> The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of

> appeal, it was thought useful to emphasize the fact that except as provided, *the period during which a notice of appeal may be filed is the 30 days* or 60 days as the case may be, *following the entry of the judgment or order appealed from*. (emphasis added).

The notice of appeal filed by Jones sought to appeal the district court orders of August 18 and September 1, 1988 as well as the entry of Judgments in a Civil Case dated August 19 and September 9, 1988. Due to the pending counter-claim, these orders and judgments were not final nor were they appealable under 28 U.S.C. § 1291. Unquestionably, the notice of appeal filed by Jones on September 16, 1988 was premature and untimely. The sole final Judgment in a Civil Case was entered by the clerk on October 6, 1988. Jones failed to file a notice of appeal from this final judgment in order for the appellate court to invoke jurisdiction over this case.

The time period within which to file a notice of appeal *cannot* be enlarged due to its jurisdictional nature. Fed.R.App.P. 2 provides, in part:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules. . . .

Fed.R.App.P. 26(b) provides, in part:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the *court may not enlarge the time for filing a notice of appeal* . . . (emphasis added).

Furthermore, the United States Supreme Court has required strict and technical compliance with Fed.R.App.P. 3 and 4. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). In *Torres*, this Court strictly construed Fed.R.App.P. 3 and 4 and dismissed an appeal on jurisdictional grounds, stating:

> We find support for our view in the Advisory Committee Note following Rule 3:
>
> "Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' *United States v. Robinson*, [361 U.S. 220, 224, 80 S.Ct. 282, 285, 4 L.Ed.2d 259 (1960)], compliance with the provisions of those rules is of the utmost importance." 28 U.S.C. App., p. 467.
>
> This admonition by the Advisory Committee makes no distinction between the various requirements of Rule 3 and Rule 4; rather it treats the requirements of these two rules as a single jurisdictional threshold. The Advisory Committee's caveat that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted," *ibid.*, is not to the contrary. The examples cited by the Committee make clear that it was referring generally to the kinds of cases later addressed by the 1979 amendment to Rule 3(c), which excuses "informality of form or title" in a notice of appeal. [Footnote omitted]. Permitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold.

Torres, 108 S.Ct. at 2408.

This Court further prohibited courts of appeal from *enlarging* the time period within which to file a notice of appeal due to its expressly limited jurisdiction, stating:

> Rule 2 gives courts of appeals the power, for "good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." Rule 26(b), however, contains certain exceptions to this grant of broad equitable discretion. *The exception pertinent to this case forbids a court from "enlarg[ing]" the time limits for filing a notice of appeal, which are prescribed in Rule* 4. (emphasis added).

Torres, 108 S.Ct. at 2407-08.

The choice of the word "enlarge" in Fed.R.App.P. 26(b) is extremely important and telling. "Enlarge" is broader than the word "extend." If Fed.R.App.P. 26(b) merely prohibited courts of appeals from "extending" the time for filing a notice of appeal, a premature notice of appeal may be treated differently. Fed.R.App.P. 26(b), however, prohibits courts of appeals from "enlarging" the time period prescribed for filing the notice of appeal. Therefore, the filing of a *premature* as well as the *late* notice of appeal is forbidden and strictly prohibited. Fed.R.App.P. 2, 3(a), 4(a)(1), 26(b); *Torres, supra*.

Fed.R.App.P. 4(a)(1) requires that a notice of appeal shall be filed with the clerk of the district court *"within* thirty days *after* the date of the entry of the judgment or order appealed from." (emphasis added). The only final appealable judgment as certified by the district court pursuant to Fed.R.Civ.P. 54(b) was the judgment entered on October 6, 1988. Fed.R.Civ.P. 54(b); Fed.R.App.P. 4(a)(1) and (6). Jones clearly failed to file a timely notice

of appeal *within* thirty (30) days *after* the date of judgment entered on October 6, 1988 as required by law. Fed.R.App.P. 3(a), 4(a)(1) and (6); *Torres, supra*. The appellate court did not have jurisdiction pursuant to 28 U.S.C. § 1291 over a clearly premature notice of appeal filed on September 16, 1988 from a non-final order or judgment. 28 U.S.C. § 1291; Fed.R.App.P. 2, 3(a), 3(c), 4(a)(1) and (6), 26(b); Fed.R.Civ.P. 54(b); *Torres, supra*.

B. THE NOTICE OF APPEAL FILED BY JONES FAILED TO DESIGNATE THE JUDGMENT, ORDER OR PART THEREOF APPEALED FROM AS REQUIRED UNDER FED.R.APP.P. 3(c).

The notice of appeal shall specify the party taking the appeal, shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Fed.R.App.P. 3(c). The notice of appeal filed by Jones on September 16, 1988 purports to appeal the:

> [J]udgment entered in this action on the 19th day of August, 1988 and on the 9th day of September, and the orders granting summary judgment and denying leave to file amended complaint entered in this action on the 18th day of August, 1988 and order entered in this action on the 1st day of September, 1988.

Undoubtedly, the orders and judgments cited in the notice of appeal are not final and appealable orders and judgments entered as required under Fed.R.App.P. 4(a)(6). The notice of appeal filed on September 16, 1988, fails to designate the only true judgment entered on October 6, 1988. Fed.R.App.P. 3(c) and 4(a)(6). Failure to strictly comply with the mandates of Fed.R.App.P. 3(c)

will result in dismissal of the appeal. *Torres, supra; Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988) *on rehearing*. In *Torres*, 108 S.Ct. at 2409, this Court stated:

> We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process." [citation omitted].

C. A PRIOR SEVENTH CIRCUIT CASE RELYING ON THE "PRACTICAL APPROACH" TO APPELLATE JURISDICTION IS MISPLACED IN LIGHT OF A RECENT SUPREME COURT CASE.

A motion to dismiss this appeal for lack of appellate jurisdiction was denied by the appellate court citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 760 F.2d 177 (7th Cir. 1985) ("LCO"). *Jones*, 882 F.2d at 1280, n.4. In *LCO*, 760 F.2d at 181, n. 3., the appellate court stated:

> In *Marrese [v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985)], the district court certified an interlocutory order for immediate appellate review after the defendant had filed a notice of appeal on another issue. Here the district court certified its partial judgment for Rule 54(b) review after the State had filed a notice of appeal from the same judgment. Despite this factual difference between *Marrese* and this case, however, we believe that the *Marrese* decision demonstrates the Supreme Court's *practical approach to appealability rules*. (emphasis added).

To the contrary, the Supreme Court requires strict and technical compliance with Fed.R.App.P. 3 and 4 as a jurisdictional threshold. *Torres, supra.* Moreover, the Seventh Circuit in *Allen Archery, supra,* did not follow the "practical approach to appealability rules" as suggested by *LCO,* 760 F.2d at 181, n. 3 but rather, correctly noted that "*Torres* changed the law in this circuit." *Allen Archery,* 857 F.2d at 1177.

Jones also suggests in the circuit court that no prejudice has been shown by Psimos in allowing this appeal to go forward. This matter has been pending for nearly six (6) years. Substantial time, costs and expenses have been incurred in defending this meritless case. The court of appeals does not require prejudice as a ground to assert lack of appellate jurisdiction. A litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court. *Torres,* 108 S.Ct. at 2409, n. 3.

Every court has an independent duty to determine whether it has jurisdiction over an appeal. *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.,* 860 F.2d 1441, 1443 (7th Cir. 1988). Upon review of the undisputed facts, this Court does not have jurisdiction over a premature notice of appeal filed on September 16, 1988 from a non-final order or judgment and this petition should be denied. 28 U.S.C. §§ 2101(c) and 1291; Fed.R.App.P. 2, 3(a) 3(c), 4(a)(1) and (6), 26(b); Fed.R.Civ.P. 54(b); *Torres, supra; Allen Archery, supra.*

II. PETITIONER HAS FAILED TO TIMELY FILE CORRECTED COPIES OF THE PETITION WITH THIS COURT WITHIN 150 DAYS AFTER ENTRY OF THE ORDER DENYING THE PETITION FOR REHEARING.

In a civil case, a party has ninety (90) days from the date of the judgment or, if a petition for rehearing was filed, from the date of the denial of the rehearing, within which to file petition for writ of certiorari in the United States Supreme Court. 28 U.S.C. § 2101(c) and Sup.Ct.R. 13.1. The court of appeals has no authority to enlarge these times, but this Court may extend the time up to sixty (60) additional days in civil cases. 28 U.S.C. § 2101(c); Sup.Ct.R. 13.2.

The court of appeals denied Jones' petition for rehearing on September 26, 1989. A petition for writ of certiorari was purportedly filed on December 26, 1989. On January 11, 1990, the Clerk of the Supreme Court returned the petition for failure to comply with several of the Court's rules of procedure. The original filing of the petition, however, shall not thereby be deemed untimely provided that new and proper copies are "promptly substituted." Sup.Ct.R. 33.7.

According to the clerk's office, corrected copies of the petition were not filed until March 1, 1990, sixty-five (65) days from the date of the original filing. Respondent asserts that the corrected copies were not "promptly substituted" as mandated by Sup.Ct.R. 13.7. In any event, the corrected copies were not filed until one hundred fifty-five (155) days from the date of denial of rehearing which is in excess of the maximum one hundred fifty (150) days allowed to pursue an appeal. 28 U.S.C. §2101(c);

Sup.Ct.R. 13.1 and 13.2. If the Court finds that the provisions of Sup.Ct.R. 13.7 have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs or disciplinary sanctions upon counsel. Sup.Ct.R. 13.7. The untimely petition should therefore be dismissed. 28 U.S.C. §2101(c); Sup.Ct.R. 13.1, 13.2 and 13.7.

III. PETITIONER HAS FAILED TO CITE TO SUFFICIENT EVIDENCE IN THE RECORD TO SET FORTH A *PRIMA FACIE* CASE OF LEGAL MALPRACTICE AT THE APPELLATE LEVEL UNDER INDIANA LAW.

In Indiana, the essential elements for a cause of action for attorney negligence or legal malpractice are as follows:

1. Employment of the attorney (the duty);
2. Failure of the attorney to exercise ordinary skill and knowledge (the breach); which
3. Proximately causes;
4. Loss to the plaintiff (damages).

Bailey v. Martz, 488 N.E.2d 716, 719 (Ind.App. 1986); *Fiddler v. Hobbs*, 475 N.E.2d 1172, 1173 (Ind.App. 1985).

To state a claim for attorney malpractice under Indiana law, a party must establish that there was a valid claim in the underlying action which was allegedly mishandled by the defendant attorney. 3 Ind.Law. Ency., *Attorney and Client*, Section 78. In other words, the client must show that the attorney's negligence proximately

caused the injury. *National Wrecking Company v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101, 104 (7th Cir. 1986); *Nave v. Baird*, 12 Ind. 318 (1859).

In *National Wrecking*, the plaintiff failed to establish a valid underlying cause of action and therefore failed to prove causation. Summary judgment in favor of the defendants was granted by the district court and affirmed on appeal. Moreover, the case of *Fiddler, supra*, presents a similar situation to the case at bar. In *Fiddler*, a dissatisfied divorce client brought an action against her attorney alleging negligence in representing her during the proceedings. Because the client could not prove causation, summary judgment in favor of the attorney was granted and affirmed by the Court of Appeals of Indiana.

The statutory obligation to divide marital assets requires the trial court to consider division of both assets and liabilities. *Hunter v. Hunter*, 498 N.E.2d 1278, 1293 (Ind.App. 1986); *Wells v. Wells*, 489 N.E.2d 972 (Ind.App. 1985). The trial court may use its sound discretion in applying the five statutory factors to divide assets and liabilities so as to minimize the impact of any one factor. *Hunter*, 498 N.E.2d at 1293; *In Re: Marriage of Rupp*, 449 N.E.2d 1164 (Ind.App. 1983). In arriving at a just and reasonable property disposition in a dissolution proceeding, the trial court need not affirmatively set out each statutory consideration affecting division and need not split the property equally. *Hunter*, 498 N.E.2d at 1293; *Baker v. Baker*, 488 N.E.2d 361 (Ind.App. 1986). Instead, the division of marital property is placed within the sound discretion of the trial court. *Hunter*, 498 N.E.2d at 1293.

Under Indiana law, there is a "strong presumption" that the trial court considered the statutory factors and properly applied them in its division of marital assets. *Hunter*, 498 N.E.2d at 1293; *Baker*, 488 N.E.2d at 365; *In Re: Marriage of Mulvihill*, 471 N.E.2d 10 (Ind.App. 1984). the party challenging the trial court's division of marital property bears the burden of overcoming this strong presumption. *Hunter*, 498 N.E.2d at 1293; *Temple v. Temple*, 435 N.E.2d 259 (Ind.App. 1982). The trial court's decision will be reversed "only where the result reached is clearly against the logic and effect of the facts and circumstances before the court. The fact that the evidence might support a different conclusion by the trial court does not permit us to substitute our judgment." *Rupp*, 449 N.E.2d at 1166 (citing *Taylor v. Taylor*, 436 N.E.2d 56 (Ind. 1982), and others).

On January 25, 1984, the trial court issued its order which states, in part:

> This hearing involved four long, difficult days of testimony with a stack of exhibits, with each of the parties spending a considerable amount of time attempting to prove that the other party was secreting assets. It would further appear to the Court that the parties were more interested in punishing the other party for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair and equitable settlement of the marital property. The Court finds from the testimony that said allegations of secreting assets are probably true as to both parties, but also finds that the assets secreted by each party were of equal value and is not a matter that the Court will consider in its final decision.

Petitioner's Appendix, (App. 50-51).

Upon a complete review of the underlying transcript, it is unquestionably clear that both Marcia and Edward used cash from the gas station receipts to make purchases and expenditures on their own behalf. (Tr. 302, 439). Although Marcia was employed as a teacher, she was given $600.00 cash per week ($31,200.00 per year) by Edward from gross receipts of the gas station for her own personal and household expenses. (Tr. 302, 439). Marcia acquired large quantities of clothing, expensive diamond jewelry and furs. The couple's federal income tax returns for the years of their marriage do not indicate a level of income that would permit them to net over $30,000.00 from the gas station business each year for personal and household expenses. *Jones*, 882 F.2d at 1278.

In 1979, Marcia considered the marriage in trouble. (Tr. 439). At about that time, Marcia was suspected of taking undisclosed amounts of cash from the gas station receipts. (Tr. 393). Soon thereafter, Edward asked Marcia to return all keys to the gas station. (Tr. 393, 436). Marcia also signed the 1979 federal income tax returns which showed income from the gas station at less than $6,000.00. (Tr. 442).

After the filing of the dissolution, Marcia sold, without Court approval, an organ for $3,000.00 which was a marital asset. (Tr. 526). She also located blank checks from the gas station account and secretly removed a few checks, which were approximately 300 checks ahead of those being currently used so as to avoid detection. (Tr. 434-436). She cashed some of these checks in the amount of $3,000.00. (Tr. 430-433). Two days after the dissolution action was filed, she withdrew $1,200.00 from her credit union savings account. (Tr. 424). The record reveals that

after the filing of divorce Marcia secreted assets in the amount of $7,200.00.

A. PETITIONER HAS FAILED TO REBUT THE PRESUMPTION UNDER INDIANA LAW THAT AN EQUAL DIVISION OF MARITAL PROPERTY IS JUST AND REASONABLE.

Allegations and counter-allegations were exchanged between the parties as to their spending conduct both prior to and after the filing of the petition for dissolution. The trial judge had the opportunity to observe both parties and found them to be bitter and acrimonious toward each other interested more in punishing one another than in aiding him in the equitable division of their property. The Court of Appeals of Indiana does not second guess a trial judge's weighing of the evidence. *Temple*, 435 N.E.2d at 262.

Under Indiana law, there is a presumption that an equal division of marital property between the parties is just and reasonable. Ind. Code §31-1-11.5-11(c). However, this presumption may be rebutted by a party who presents relevant evidence that an equal division would not be just and reasonable. Ind. Code §31-1-11.5-11(c). The party challenging the trial court's division of property bears the burden of proof in overcoming this presumption. *Hunter*, 498 N.E.2d at 1293; *Temple*, 435 N.E.2 at 260. Furthermore, the standard of review requires the reviewing court not to reweigh the evidence, and to consider only evidence and reasonable inferences most favorable to the appellee. *Baker*, 488 N.E.2d at 364; *Swinney v. Swinney*, 419 N.E.2d 996, 998 (Ind.App. 1981).

Upon review of the totality of the circumstances, the Seventh Circuit reasonably inferred that the money bags that were brought home by Edward consisted of cash receipts from the gas station. Marcia acknowledged that she received $600.00 cash per week from the gross receipts of the gas station for her own personal and household expenses. (Tr. 302, 439). The gas station business may have appeared to be thriving at one point, but the weekly withdrawals which gave the business an appearance of good health were actually a cancer that left the station over $80,000.00 in debt at the time of the dissolution. *Jones*, 882 F.2d at 1277. Marcia suggests that her unsupported claims regarding the extent and value of the money bags, speculative as it is, supports a different conclusion than that reached by the trial court. The fact that the evidence might support a different conclusion by the trial court does not permit the reviewing court to substitute its judgment. *Rupp*, 449 N.E.2d at 1166 (citing *Taylor*, 436 N.E.2d 56 (Ind. 1982) and others). Jones has failed to rebut the presumption that an equal division of assets is just and reasonable. Ind. Code §31-1-11.5-11(c).

The proper role of a trial court in dividing property is to review carefully all the evidence and then to divide the property based on a consideration of the statutory factors. *In Re: Marriage of Church*, 424 N.Ed.2d 1078, 1082, (Ind.App. 1981). There is no mandate that a trial judge dividing marital property in a dissolution proceeding state how and why he found and concluded the way he did. *Cornett v. Cornett*, 412 N.Ed.2d 1232, 1235 (Ind.App. 1980). The district court concluded that Marcia was awarded net marital assets valued at approximately $44,500.00. On the other hand, Edward was awarded net

marital assets of $43,000.00. See Respondent's Appendix (App. 10). In the end, the Indiana trial judge made a virtually equal division of those net marital assets that he could clearly identify and value from four days of testimony. This virtual equal division of net marital assets remains unchallenged by the petitioner. Given the presumption under Indiana law that an equal division of marital property is just and reasonable, it cannot be said that the trial court abused its discretion in finding that both parties probably secreted assets of equal value.

B. PETITIONER HAS FAILED TO REBUT THE PRESUMPTION UNDER INDIANA LAW THAT THE TRIAL COURT CONSIDERED AND APPLIED THE FIVE STATUTORY FACTORS FOR DIVISION OF MARITAL PROPERTY.

The Indiana appellate court reviews property distribution decisions under an abuse of discretion standard. *Hunter,* 498 N.E.2d at 1293; *Rupp,* 449 N.E.2d at 1166. On review, the appellate court does not reweigh the evidence and considers only that evidence, and reasonable inferences therefrom, that is most favorable to the appellee. *Rupp,* 449 N.E.2d at 1166. There is a presumption under Indiana law that the trial court properly applied these factors when dividing marital property. *Id.; Baker,* 488 N.E.2d at 365; *Mulvihill,* 471 N.E.2d at 13. The party challenging the trial court's division of property bears the burden of proof in overcoming this presumption. *Hunter,* 498 N.E.2d at 1293; *Temple,* 435 N.E.2d at 260.

Given this presumption, petitioner asserts that the trial court failed to consider disposition of assets during

the course of the marriage. It is important to note the context in which the trial court made a statement after four days of testimony. The trial court stated:

> I've heard going on four days of testimony, and what I have to do is try to sort out something which probably boils down to about an hour of testimony. [W]hat I've gotta do is divide up these parties' marital, marital property, and what they've spent or what they've disposed of during the course of their marriage is, is really not relevant.

(Tr. 585).

In addition to the presumption afforded to a trial court that it considered and applied the five statutory factors, the district court made an independent review of the record and specifically found that the trial court considered and applied all five statutory factors. Respondent's Appendix (App. 10-11). The independent examination and determination by the district court continues to remain unchallenged by the petitioner. As stated by the circuit court:

> We are left finally with only two issues that merit discussion: the trial court's conclusion that both parties in the Joneses' divorce had secreted marital assets and the judge's determination that the secreted assets were of equal value. This second conclusion permitted the judge to ignore the parties' allegations of concealment and dissipation of assets and get down to the business of dividing up what they were in fact able to prove existed.

Jones, 882 F.2d at 1283.

The circuit court correctly interpreted the trial court's comment on the fourth day of testimony that the trial

court, at that point in time, was more interested in identifying and valuing existing marital assets and liabilities. This is further evidenced by the trial court's order of January 25, 1984, which stated:

> This hearing involved four long difficult days of testimony with a stack of exhibits, with each of the parties spending a considerable amount of time attempting to prove the other party was secreting assets. It would further appear to the Court that the parties were more interested in punishing the other for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair and equitable settlement of the marital property.

Petitioner's Appendix (App. 50-51).

Petitioner asserts that failure to consider one of the required statutory factors, especially when complicated by a difficult factual record, requires a retrial, citing *In Re: Marriage of Salas*, 447 N.E.2d 1176, 1181 (Ind.App. 1983). Petitioner's reliance on this case is misplaced. In *Salas*, the trial court failed to consider the parties' debts when it awarded the wife a judgment in excess of the marital estate. Moreover, review of the record was complicated by the lack of an intelligible record due to mechanical failures during the proceedings coupled with the fact that English was not the native language of either party. The trial court specifically stated that its reversal was not due to the excessive award but rather the lack of an intelligible record prohibiting review of the evaluation of the marital estate. *Salas*, 447 N.E.2d at 1181.

Since there was an insufficient record to review the trial court's findings and noting that the trial court failed to consider the parties' debt when it issued its award,

reversal was required based on the specific facts in that case. In the case at bar, the facts are completely different and distinguishable. Here, the trial court allowed four long days of testimony in which each party was allowed to testify as to identity and value of assets and liabilities. In this case, there was no language barrier, problem with the record on appeal or lack of debt distribution by the trial court and therefore *Salas* is inapplicable.

Petitioner continues to assert that the American Surgery Center stock was improperly valued. The trial court found that the value of the stock was $937.00. The undisputed evidence indicates that 250 shares of the stock were purchased at 4⅛ and 500 shares were later purchased at 2. (Tr. 217). The value of the stock continued to drop. On February 9, 1982, the date of valuation, the stock was valued at 1⅛ to 1¼ per share according to the Wall Street Journal. (Tr. 709). The top value of the stock on February 9, 1982, as found by the trial court is $937.00 (750 shares X 1¼ = $937.50).

Under Indiana law, the court shall divide the marital property of the parties, whether owned prior to or acquired after the marriage and prior to final separation of the parties. Ind. Code §31-1-11.5-11(b). For the purposes of this statutory section "final separation" means the date of filing the petition for dissolution of marriage. Ind. Code §31-1-11.5-11(a). The Seventh Circuit correctly held that under Indiana law the value of a marital asset or liability is to be measured at the time of the filing of the petition for dissolution, February 9, 1982.

The value of any asset or liability can change from day to day. A stock's value can fluctuate dramatically in

either direction. The trial court must have a date certain on which all assets and liabilities are to be fixed and assigned a value. Thus, all assets and liabilities are treated equally by the trial court without focus on any one over another.

Finally, in passing, the petitioner argues that the Seventh Circuit may have applied the wrong test. In doing so petitioner picks one sentence out of an entire paragraph wherein the Seventh Circuit was analyzing its role in the case and reached the correct conclusion that its task was to place itself "in the shoes of an Indiana appellate court." *Jones*, 882 F.2d 1282. Further, the proposition that the Indiana appellate court could have remanded the case to the trial court so that additional evidence could be submitted has been waived. A party who fails to introduce evidence as to the value of the marital property is estopped from appealing the property distribution due to absence of evidence. *Salas*, 447 N.E.2d at 1181; *Church*, *supra*.

The trial court judge had the best opportunity to observe the demeanor and determine the credibility of each party. The record in this case is lengthy and consists of four days of conflicting testimony. The trial court had the monumental task of deciding which witnesses were credible, which assets and liabilities existed on February 9, 1982, which value should be assigned to the debts and assets, and what distribution of marital assets and debts would be just and reasonable under the circumstances.

The essence of this case is that prior to the marriage, Edward owned a gas station business and Marcia was a teacher. During the marriage, the parties spent in excess of their means and incurred substantial debt on behalf

of the gas station business to the point where the business was losing money in 1981 and the husband owed substantial back taxes. The trial court was not obligated to find the gas station business a marital asset since it was acquired by Edward prior to the marriage, but did so. The trial court awarded the floundering gas station business to the husband along with all business debts and associated tax problems which may include penalties. The wife was awarded the marital home and the new car.

Upon review of all the circumstances in this case, Marcia Jones has failed to establish two essential elements – proximate cause and damages – in order to set forth a *prima facie* case. Marcia has also failed to establish that the trial court abused its discretion in awarding virtually equal amounts of net marital assets to each party of the dissolution. Marcia has further failed to establish that the district judge erred in granting summary judgment in favor of Psmios which was affirmed on appeal. As stated by the district court:

> This Court has painstakingly reviewed the voluminous record in this case, and concludes that the gravamen of Marcia's Complaint is unsupported allegations about the existence and value of certain marital assets. Despite *many* opportunities and this Court's express directive that Marcia support these allegations with references to the transcript or other documentation, she has been unable to prove up her assertions.

Respondent's Appendix (App. 11-12).

IV. PETITIONER HAS NOT RAISED A SUBSTANTIAL FEDERAL QUESTION.

The issues raised by the petitioner do not merit review by this Court. A petition for writ of certiorari will be

granted only when there are special and important reasons therefor. Sup.Ct.R. 10.1. The petitioner has failed to set forth any ground upon which this court should exercise its discretionary power of review.

The Jasper Circuit Court order dated January 25, 1984, has been reviewed and approved at four separate judicial levels: the trial court denied post judgment motions on April 16, 1984; the district court granted summary judgment in favor of the respondent on August 18, 1988; the circuit court affirmed the district court's granting of summary judgment in favor of the respondent on August 21, 1989; and the circuit court denied rehearing on September 26, 1989. The decision by the United States Court of Appeals for the Seventh Circuit correctly determined that the petitioner failed to establish a *prima facie* case for attorney malpractice at the appellate level under Indiana law and that the district court therefore did not err in granting respondent's motion for summary judgment. Petitioner has not raised a substantial federal question which would merit review by this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MARCIA JONES,
Plaintiff,
v.
HARRY PSIMOS,
Defendant,
No. H84-755

****

HARRY PSIMOS,
Counter-Claimant,
v.
MARCIA JONES,
Counter-Defendant.

FILED
AUG 18 1988

ORDER

Presently before this Court is the Defendant's (hereafter Psimos) Motion for Summary Judgment, arising out of Plaintiff's claim of legal malpractice. The origin of this case is the divorce proceedings between Marcia and Edward L. Jones. A dissolution of marriage was entered in Lake Superior Court under Case No. 382-192. The issue of property distribution was reserved for a later time.

On November 23, 1982, Jasper Circuit Court Judge Daugherty entered an order dissolving the marriage. Thereafter, the parties conducted discovery with regard to the issue of property distribution. The Court held a hearing on the issue of property distribution and testimony was presented for four days in the Summer of 1983.

On January 25, 1984, Judge Daugherty entered an order distributing the marital assets.

Subsequent to January 25, 1984 and pursuant to the request of Marcia, Psimos filed a motion to correct errors. This motion was denied on April 16, 1984. Thereafter, Psimos filed a Praecipe to initiate an appeal of Judge Daugherty's decision. A pre-appeal statement and other relevant pleadings were not timely filed and the Court of Appeals dismissed the case. Subsequent efforts to reinstate the appeal were fruitless.

Several lawsuits were filed by Marcia as a result of the divorce proceedings, in addition to the one presently before the Court. However, it is the Court's opinion that these previous proceedings are not relevant to this Court's resolution of the issue before it.

In relevant part, the Complaint alleges that Psimos was employed to appeal Judge Daugherty's order of property distribution. In violation of his duty to timely proceed with this appeal, Psimos failed to file the requisite documents and the case was dismissed. Specifically, the Complaint alleges:

> "5. In violation of his duty to the plaintiff, the defendant, Harry Psimos, failed to file the required documents within the time permitted, and thereby forfeited the plaintiff's right to appeal. This failure was negligent, in breach of contract with his client, the plaintiff to protect her rights on appeal, and not in accordance with the standard for the practice of law in Indiana.
>
> 6. As a result of the defendant's misconduct, as aforesaid, the plaintiff has been damaged by not having the opportunity of having the court of

> appeals review the judgment of the Jasper Circuit Court which awarded substantial property to her former husband. The plaintiff has been damaged in the approximate amount of $800,000."

Under Indiana law, in order for a plaintiff to succeed on a claim for attorney negligence or legal malpractice, the plaintiff must prove: (1) employment of the attorney (the duty); (2) failure of the attorney to exercise ordinary skill and knowledge (the breach), which (3) proximately causes; (4) loss to plaintiff (damages). *Bailey v. Martz*, 488 N.E.2d 716, 719 (Ind. App. 1986); *Fiddler v. Hobbs*, 475 N.E.2d 1172, 1173 (Ind. App. 1985). Psimos directs this Court to an excerpt from R.E. Mallen and V.B. Levit, *Legal Malpractice*, 2d, the Appellate Attorney, §583, pp. 738-740 which states:

> "*CAUSATION*. The most common issue concerning an error in handling an appeal is whether the attorney's negligence caused damage. Initially, the client must prove that but for the attorney's negligence, the plaintiff would have prevailed on appeal. (Citations omitted)."

The passage goes on to discuss that the reviewing judge must determine what an appellate court would have done upon review of the underlying action, if the attorney's negligence had not precluded this review. It is noted that this decision must be made by a trial judge "as an issue of law, based upon review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied by the appellate court." (Citation omitted).

> " . . . Even if the appeal would have been successful, the plaintiff *must* next prove that he would have achieved a better result. (Citations

> omitted). This burden will be satisfied if the appeal itself would have resulted in a judgment in the client's favor without the need for a retrial. If a retrial is the end result of appellate review, however, then the client must next persuade the trier of fact that he would have done better upon a new trial. (Citation omitted). There must be a compensable injury since negligence of that damage is not actionable. (Citation omitted)."

In *National Wrecking Company v. Spangler, Jennings, Spangler, and Dougherty*, 782 F.2d 101 (7th Cir. 1986), the Seventh Circuit stated:

> "To state a claim for attorney malpractice under Indiana law, a party *must* establish that there was a valid claim in the underlying action which was allegedly mishandled by the defendant attorney. 3 *Ind. Law Ency. Attorney and Client*, §78. In other words, the client *must show that the attorney's negligence proximately caused the injury.* (Emphasis added)."

The first issue for this Court to address is whether the decision of Judge Daugherty concerning marital property distribution would have been reversed on appeal. The trial court has discretionary power concerning the division of marital property. *Baker v. Baker*, 488 N.E.2d 361 (Ind. App. 1986); *Planert v. Planert*, 478 N.E.2d 1251 (Ind. App. 1985). As the Indiana Appellate Court stated in *Baker*:

> "It is only the abuse of such discretion which is reviewable on appeal. The presumption in favor of the correct action of the trial court is one of the strongest presumptions applicable to the considerations of a case on appeal. *Temple v. Temple*, 164 Ind. App. 215, 328 N.E.2d 227, 223 (Ind. App. 1975).

> The trial court action will not be reversed for an abuse of discretion unless there is shown to have been an erroneous conclusion in judgment clearly against the logic of the facts and circumstances and the deductions to be drawn therefrom. *York v. York*, 472 N.E.2d 1308, 1309 (Ind. App. 1985). Furthermore, our standard of review requires us not to reweigh the evidence, and to consider only the evidence and reasonable inferences most favorable to the appellee. *Swinney v. Swinney*, 419 N.E.2d 996, 998 (1981)."

Thus, it is clear that this Court must evaluate whether the trial court abused its discretion in distributing the marital assets in the Jones proceedings. The trial court is required under Indiana Code 31-1-11.5-11 to divide the property of the parties in a just and reasonable manner taking into consideration the following factors set forth in 31-1-11.5-11(c): (1) the contribution of each spouse to the acquisition of the property, including contribution of a spouse as homemaker; (2) the extent to which the property was acquired by each spouse prior to marriage or through inheritance or gifts; (3) the economic circumstances of each spouse at the time of the disposition of the property is to be effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children; (4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property; and (5) the earnings or earning ability of the parties as related to a final division of the property and final determination of the property rights of the parties.

Employing these considerations, the trial judge must weigh the evidence of the contributions by the parties

and the assets presented in the record. The court in *Baker* stated that there is a strong presumption that the trial court considered the statutory factors found in 31-1-11.5-11(c) and properly applied them to its division of marital property assets. *Baker v. Baker,* 488 N.E.2d 361, 365 (Ind. App. 1986).

In the present case, there are voluminous transcripts and several affidavits in the record. A review of the entire record establishes that during the four days of testimony heard by Judge Daugherty, evidence on the following matters was presented to the court: (1) business statistics of the Jones' Shell station; (2) appraisal of the family home (two appraisals were submitted to the court, one by each party); (3) appraisal of personal property within the home; (4) appraisal of an organ; (5) appraisal of the business property, i.e., equipment; (6) federal tax returns and tax related information; (7) a business operating statement; (8) W-2 Forms for Marcia; (9) checks written to Marcia on the Shell account; (10) numerous Merrill Lynch account statements concerning a commodity account, which included information concerning treasury bills, ready assets trust, security account; (11) checks purchased at the Gary National Bank, which related to trading in the Merrill Lynch accounts; (12) J.W.J.T. Inc. account statement; (13) statement from Bache-Heilsey Stewart Shield Inc. commodity account; (14) monthly budget and bills owing and paid in February of 1982; (15) Town and Country charge statements; (16) Marcia's credit union account; (17) silverware and china owned by the Jones; (18) art work purchased; (19) several account statements from Marcus Jewelers; (20) account statement from

Evans, women's clothing store; (21) statements concerning Marcia's earnings and deductions re Lincoln School employment; (22) Prudential insurance policy; (23) trips and vacations; (24) gifts to other women by Edward; (25) mortgage records; (26) monthly expenditures before separation; (27) bank records from the First National Bank of East Chicago; (28) account statements from Lane Bryant; and (29) Shell production account.

In Judge Daugherty's order, he begins by addressing the obvious attempt of the parties to "punis[h] the other party for the alleged wrongs they felt were committed against them in the marriage, rather than arriving at a fair and equitable settlement of the marital property." Judge Daugherty found from the testimony that the allegations of secreting assets were probably true as to both parties, and that the assets secreted by each party were of equal value and was not a matter that the court would consider in its final decision.

Judge Daugherty went on to identify and discuss the fact that the Shell business had business debts in excess of $82,000, which most notably included unremitted taxes to the State of Indiana exceeding $40,000. Further, Judge Daugherty considered the family home, and used Marcia's appraisal as the value of that property, household furniture and furnishings in the residence, personal property, family automobiles, American Surgeries Center common stock, Marcia's jewelry, and Edward's jewelry.

Judge Daugherty found that the Shell business should be considered a marital asset, in light of Marcia's contributions to the business during the marriage, and valued the business at $110,000. The court identified the

parties' debts incurred during marriage to include: (1) mortgage on the family home; (2) business debts of the Shall station; (3) personal debts incurred by Edward; (4) personal debts incurred by Marcia; and (5) Marcia's debt to her credit union.

In the final dissolution of the property, Judge Daugherty ordered that Marcia be awarded: (1) the family residence; (2) a 1981 Mazda automobile; (3) her jewelry; (4) one-half of the household furniture and furnishings, to be divided as provided for in his order. He further found that Marcia would assume the following debts: (1) the mortgage on the family home and all other debts or liens relating to the real estate, such as taxes; (2) any and all debts owing to her credit union; (3) Marcus Jewelers; (4) Lane Bryant; (5) John M. Smith; (6) L.S. Ayres; and (7) any and all other debts incurred by her, but not specifically ordered paid by the husband.

Judge Daugherty found that Edward would be awarded: (1) the Shell service station business and all accounts related thereto; (2) all personal property related to the filling station business, to include tools, equipment, and inventory; (3) American Surgery Center stock; (4) Edward's jewelry; (5) 1973 Lincoln automobile; (6) one-half of the household furniture and furnishings, to be divided as hereinafter stated; (7) all shares of stock in J.W.J.T. Inc.; (8) all interest in a Merrill Lynch ready account; (9) Watkin's account; (10) commodity account and gainer account numbers 540-5749 and 540-5736. The court further found and ordered that Edward would assume the following debts: (1) the Shell service station; (2) personal debts incurred by Edward, including Visa, Mastercharge, TWA, United Airlines, Sears, J.C. Penny, Evans,

and American Express, and any other debts incurred by him and not specifically ordered paid by Marcia.

Lastly, the court found that neither party was without the money or means to employ counsel and that each would be responsible for paying their own attorney fees.

Keeping in mind that the standard by which this Court must review Judge Daugherty's decision is limited to the issue of whether he abused his discretion in distributing the marital assets, it appears that this issue must be answered in the negative. With the values available, a mathematical analysis of the distribution of assets and liabilities to Marcia and Edward appears to establish almost a 50-50 distribution. According to the Court's analysis, Marcia was assigned approximately $91,400 in assets and approximately $46,900 in liabilities. Thus, Marcia was awarded net assets of approximately $44,500.

As to Edward's share of the property distribution, the Court concedes that the distribution is less clear, but certainly resolvable. It is correct that Judge Daugherty's decision does not reflect the value that he assigned to certain of Edward's assets, including: shares of stock in J.W.J.T. Inc., an interest in a Merrill Lynch ready account, Watkin's account, commodity account, and gainer account numbers 540-5749 and 540-5736. However, despite her numerous unsupported allegations about the value of these assets, the Plaintiff has been unable to produce any evidence about their value.

The Court has sifted through the many pages of the transcript in this case, and has also been unable to find any evidence regarding the value of the above identified

assets at the time of marital dissolution. The Court therefore assumes that the trial judge found that if after a four day hearing on the matter no evidence as to these assets' value was produced, these assets were of nominal value or did not exist at all in some cases.

A review of the record in this case establishes that Judge Daugherty undertook the Jones' property distribution task with great diligence. Thus, this Court finds that the record establishes that the value of Edward's assets not expressly valued by Judge Daugherty in his opinion were at best of nominal value.

The value of the total assets assigned Edward is $132,800, excluding the value of the items discussed above. The value of the total liabilities assigned to Edward is $89,800. Thus, Edward was awarded net assets of approximately $43,000. To compare, Marcia was awarded approximately $44,500, and Edward $43,000.

Further, it is evident that Judge Daugherty considered the relevant factors identified by the Indiana Appellate Court for distributing marital assets. In Judge Daugherty's opinion (page 3, ¶9), he makes a finding that the Shell station business, although acquired prior to marriage, should be deemed a marital asset in light of Marcia's contribution to its development and increase in value during the marriage. (See 31-1-11.5-11(c)(1)). Secondly, Judge Daugherty considered the economic circumstances of the parties (opinion, page 2, ¶¶1, 4, 6, and 7), including a finding that both Marcia and Edward were employed and continued to be employed, and that there were no children born of the marriage. 31-1-11.5-11(c)(3).

Third, Judge Daugherty made a finding on page 1 of his opinion as to Marcia's and Edward's conduct regarding the disposition or dissipation of their property during marriage. In this finding, Judge Daugherty stated that he found both parties to be guilty of secreting assets, although he opined that the assets secreted were of equal value, and therefore, would not be considered in the disposition of marital property. (See 31-1-11.5-11(c)(4)).

Additionally, Judge Daugherty made findings as to the parties' earnings and earning capabilities. Judge Daugherty, in his opinion on page 2, ¶¶6 and 7, and page 5, ¶16, found that both parties were employed and capable of paying their own attorneys' fees. See 31-1-11.5-11(c)(5).

The only factor set forth in 31-1-11.5-11(c) that Judge Daugherty did not make a specific finding regarding is "the extent to which the property was acquired by each spouse prior to marriage or through inheritance or gift." It appears from the record that there was no property in question which fell within this category.

For the reasons previously set forth, it is the Court's opinion that if the Appellate Court had not dismissed Marcia's case, it would have affirmed the findings of the trial court. There is nothing in the record which could lead this Court to conclude that, in distributing Marcia's and Edward's marital assets, Judge Daugherty abused his discretion.

This Court has painstakingly reviewed the voluminous record in this case, and concludes that the gravamen of Marcia's Complaint is unsupported allegations about the existence and value of certain marital assets. Despite

many opportunities and this Court's express directive that Marcia support these allegations with references to the transcript or other documentation, she has been unable to prove up her assertions.

In an affidavit, Marcia states that the actual division of property by Judge Daugherty was 70% to Edward and 30% to her, in light of the fact that Judge Daugherty refused to consider the assets allegedly secreted by the parties. (Marcia Jones affidavit, ¶4). Further, she attests that Judge Daugherty failed to consider numerous assets, and that said failure constitutes an abuse of discretion. She identifies these assets to include: cashiers checks totaling $185,823.45; 17 treasury bills valued at $10,000 each; a four-way liquor license number 450154; a $40,000 certificate of deposit at the Gainer Bank; a land trust of substantial value at 1101 Taft Street, Gary, Indiana; real estate located at 25th and Chase Streets in Gary, Indiana; a one-quarter interest in J.W.J.T. Corporation; and a one-half interest in the $27,000 in the Merrill Lynch account of Willie Watkins. (Marcia Jones affidavit, ¶5).

Further, Marcia asserts that the Shell service station was undervalued. She states that almost $50,000 in assets derived from a Merrill Lynch ready trust, a Bache account, Merrill Lynch commodities account, and Jones' Shell commercial accounts were never accounted for in the divorce proceedings because subsequent to these assets being frozen by court order, they were made available to Edward and unaccounted for at the hearing. (Marcia Jones affidavit, ¶8).

This Court has been very lenient with Marcia, allowing her every opportunity to support her 70%/30% property distribution assertion. However, there is an end to patience. There is no evidence in the record to support these assertions, nor, in the Court's opinion, is any such evidence expected to be forthcoming.

For the reasons set forth in this opinion, the Court finds that Judge Daugherty did not abuse his discretion when distributing Marcia's and Edward's marital property. Therefore, his decision would have been affirmed on appeal.

Of the four elements which must be sustained under Indiana law in order for a plaintiff to succeed on a claim for legal malpractice, causation is the primary and critical element of contention in this case. In the absence of Marcia being able to show that but for her attorney's negligence, the resolution of her case would have been more favorable to her, it is impossible for her to sustain a claim for legal malpractice under Indiana law.

Therefore, the Court GRANTS the Defendant's Motion for Summary Judgment. The United States Clerk of the District Court for the Central District of Illinois is directed to enter judgment in favor of the Defendant.

ENTERED: This 18th day of August, 1988.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

Ind. Code § 31-1-11.5-11
Disposition of property; maintenance

(a) For purposes of this section, "final separation" means the date of filing of the petition for dissolution of marriage under section 3 of this chapter.

However, if:

(1) a legal separation proceeding involving the parties was pending when the petition for dissolution of marriage under section 3 of this chapter was filed; or

(2) a provisional order or final decree for legal separation of the parties was in effect when the petition for dissolution of marriage under section 3 of this chapter was filed;

the term means the date that the petition for legal separation was filed under section 3 of this chapter.

(b) In an action pursuant to section 3(a) of this chapter, the court shall divide the property of the parties, whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage and prior to final separation of the parties, or acquired by their joint efforts, in a just and reasonable manner, by:

(1) division of the property in kind;

(2) setting the property or parts of it over to one (1) of the spouses and requiring either spouse to pay such sum, either in gross or in installments, as may be just and proper;

(3) ordering the sale of the property under such conditions as the court may prescribe and dividing the proceeds of the sale; or

(4) ordering the distribution of any benefits described in section 2(d)(2) or 2(d)(3) of this chapter that are payable after the dissolution of

marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

(c) The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.

(2) The extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in that residence for such periods as the court may deem just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

(d) When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the property existing at the time of final separation. However, this award may be made only for

the financial contribution of one (1) spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.

(e) A court may make the following findings concerning maintenance:

(1) If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself is materially affected, the court may find that maintenance for that spouse is necessary during the period of incapacity, subject to further order of the court.

(2) If the court finds a spouse lacks sufficient property, including marital property apportioned to that spouse, to provide for that spouse's needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, the court may find that maintenance is necessary for that spouse in an amount and for a period of time as the court deems appropriate.

(3) After considering:

(A) the educational level of each spouse at the time of marriage and at the time the action is commenced;

(B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;

(C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and

> (D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

Ind. Code § 31-1-11.5-11 (1988)